



**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CRIMINAL APPEAL NO. OF 117 OF 2008**

**VINCENT CHERUIYOT.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**[An Appeal from original conviction and sentence in Molo SNR.R.M.CR.C.NO.2212/2005 by Hon R. KIRUI, Senior Resident Magistrate,**

**dated 30<sup>th</sup> January, 2007]**

**JUDGMENT**

The appellant who was charged with **defilement of a girl** contrary to **section 145(1)** of the **Penal Code** and in the alternative, with **indecent assault on female** contrary to **Section 144(1)** of the **Penal Code** was found guilty of the main charge and upon conviction was sentenced to 15 years imprisonment on 30<sup>th</sup> January, 2007.

Being dissatisfied, the appellant has brought this appeal through counsel challenging the conviction and sentence on the following condensed grounds:

1. that there was discrepancies in the evidence;
2. that the appellant's constitutional right to be taken to court within the prescribed period was violated;
3. that the medical evidence did not conclusively connect the appellant with the offence;
4. that the trial court failed to appreciate that the appellant was a minor.

Learned counsel for the respondent conceded the appeal on the grounds that:

1. the evidence of identification of the appellant was not conclusive;

2. that the incident was reported 11 days later;
3. that the complainant was examined by the clinical officer after 3 days

Before I consider these grounds, I must re-evaluate the evidence on record in order to arrive at my own independent conclusion bearing in mind that I have not seen or heard the witnesses.

The complainant, a female whose age was given as 14 years testified that on 26<sup>th</sup> September, 2005 at about 7p.m. as he walked to Londiani town through a maize field the appellant, who was known to her followed her and held her on the neck. He forced her down on the ground, tore her underpants and defiled her. After ejaculation, the appellant warned the complainant not to say what he had done to her. The complainant instead, upon getting home told her mother who in turn went to the appellant's home to find out why he had done such a thing to the complainant. Without answering, the appellant walked away. Three days later the complainant was taken to Londiani Hospital after making a report to the police.

The clinical officer, P.W.4, Philip Rotich confirmed that he examined the complainant on 29<sup>th</sup> September, 2005 and noted a swollen neck, while her labia minora and majora had bruises and hymen broken. But there was no spermatozoa. He concluded that from the above observation there was penetration. The local area chief, Gabriel Rono arranged for the arrested of the appellant by P.C. Kipsang Serem on 7<sup>th</sup> October, 2005.

The appellant in his unsworn defence denied committing the offence charged and maintained that the complainant's mother went to his home and found him studying for his examination. She asked him what he had done to the complainant. He told her he had not done anything. They left but two weeks later he was directed to go to the complainant's parents' home, where he met the chief and he was arrested.

I have considered this evidence. The main issue for determination is whether the appellant committed the acts charged in the charge sheet. It is the complainant's contention that she was defiled on the day in question at 7p.m. That the person who defiled her approached her from behind and covered her face; that this happened in a maize field. In those circumstances and without the evidence of any form of lighting it cannot be said conclusively that the identification by means of recognition was without error, the identification being by a single witness.

See **Adballa bin Wendo & Another Vs. Republic** (1953) 20 EACA in which it was emphasized that where a case is based on the testimony of a single witness, that evidence must be tested with the greatest care if that evidence relates to identification or recognition especially when it is known that the conditions favouring a correct identification are difficult. There must be other from which it can be concluded that that evidence, although based on the testimony of a single witness can safely be accepted as free from possibility of error.

Other than the question of identification, there is the question of credibility of the evidence itself. It is in no doubt that the complainant was a neighbour to the appellant. No explanation has been offered why it took nearly 2 weeks to arrest him, and further why it took three days to present the complainant to the clinical officer for examination.

For the reasons stated, this appeal is allowed. The conviction is quashed, sentence set aside and the appellant is ordered to be set free forthwith unless held for any other lawful reason.

**Dated, Delivered and Signed at Nakuru this 20<sup>th</sup> day of May, 2011.**

**W. OUKO**

**JUDGE**